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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 535

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-10a) is reported at 321 F. 2d 126. The original Decision and Order of the National Labor Relations Board (R. 76-94, 112-120; Pet. App. 43a-53a, 11a-42a) [1] are reported at 130 NLRB 307, and its Sup-

[1] "R." references are to the "Volume I, Pleadings" in the court below.

plemental Decision and Order (R. 121-125; Pet. App. 54a-59a) at 133 NLRB 358.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on August 6, 1963. The petition for certiorari was filed on October 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that an international union had entered into an illegal closed shop contract with a construction firm covering projects throughout the country and that the union previously had entered into similar illegal arrangements with other employers, could properly order the union to publish in one issue of its journal circulated among its members a notice that it will cease and desist from the illegal conduct found.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT

A. The Board's Findings of Fact

Petitioner, United Brotherhood of Carpenters, is an international union which has locals throughout

the United States.[2] Refinery Engineering Company, with its main office at Tulsa, Oklahoma, was engaged, at the time material here, in substantial construction work in nine different states ranging from Texas to New Jersey, including the construction of a refinery at Laurel, Montana, near Billings (R. 77; G.C. Exh. 8, pp. 4, 20, and Exhibit B).

On May 4, 1956, the Company and the Brotherhood entered into a written contract entitled "International Agreement," applicable anywhere in the country, which contained the following provision (R. 74):

> We, [the Company], agree to recognize the jurisdiction claims of [the Brotherhood], to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the [Brotherhood].

On March 14, 1956, Billings Local 1172 of the Brotherhood, which has jurisdiction over the area of the Laurel Refinery project, had entered into a two-year agreement with Billings Contractors, Inc., an association of building and construction firms in the area (R. 77-78, 80). The agreement contained the following provisions (R. 24, 25):

> The party of the first part [Billings Contractors] hereby agrees to employ only such members of

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[2] See *Directory of National and International Labor Unions in the United States*, 1961, Bull. No. 1320, Dept. of Lab., Bur. Lab. Stat. 17 (1962). The Brotherhood's headquarters were at Indianapolis, Indiana, but are now at Washington, D.C.

the party of the second part who are in good standing with the party of the second part, or who shall signify their intentions to become members and make applications for membership. Party of the second part agrees to hold employers harmless against any loss which may accrue to them in any manner through the operation of this paragraph.

* * * *

ARTICLE 4

There shall be a Shop Steward appointed by the party of the second part, and it shall be the duty of the Shop Steward to see that only members of the party of the second part are in good standing and * * * the Shop Steward * * * shall * * * report any and all violations of this agreement to both parties interested.

The "By-Laws and Trade Rules" of Local 1172 then in effect provided, *inter alia*, that a non-union man may be permitted on a job only if "he gives a cash guarantee that he will join the Local Union," in which case he must give the union a wage assignment unless he can furnish at least $10 (R. 80; R. 22, p. 16); and that a member of Local 1172 shall act as steward on each job, and shall satisfy himself that every carpenter on the job has a current working card (R. 80; R. 22, pp. 20-21).

On April 14, 1958, a charge was filed against the Brotherhood by a worker at the Company's Laurel project, alleging that the International Agreement and the local hiring arrangements implementing it restricted employment to union members, in violation

of the Act (R. 5.) On April 21, 1958, the Company wrote the Brotherhood that it had "terminated" the agreement as of that date. On May 15, the Brotherhood replied that it would "make recommendations on the necessary changes required in [its] International Agreement and would submit a draft of a new International Agreement to its General Executive Board at an early date" (G.C. Exh. 8, pp. 6-7, G.C. Exh. 20, Exhibit A). On July 9 the Company inquired as to the "recommendations on necessary changes to legalize the hiring procedures section of the contract," and added that the business agent of the Local at Perth Amboy, New Jersey, had taken the position that the Company was not under contract with the Brotherhood (G.C. Exh. 20, Exh. C). On July 14, the Brotherhood informed its Perth Amboy Local that the "Company did enter into an International Agreement with our Brotherhood on May 4, 1956, *which is still in effect*" (G.C. Exh. 20, Exh. D, emphasis supplied).

On or about August 20, 1958, the Company and the Brotherhood entered into a new labor agreement. At that time the Brotherhood advised the Company that the "old agreement which was signed sometime ago * * * is no longer effective." (R. 78; R. 75, G.C. Exh. 1D, G.C. Exh. 20, Exhibit G.)

B. The Board's Conclusions and Order

Upon the foregoing facts, the Board (one Member dissenting) concluded that the 1956 "International Agreement" between the Brotherhood and the Com-

pany, as implemented by the agreement between Local 1172 and the Billings contractors and the working rules and regulations of the Local, had the effect of conditioning employment on union membership. Accordingly, the Board held that the Brotherhood, by maintaining this contractual arrangement with the Company, violated Sections 8(b)(2) and (1)(A) of the Act (R. 78, 80, 113, 122; Pet. App. 44a, 54a-55a.)

The Board ordered the Brotherhood to cease and desist from performing, maintaining, or enforcing any agreement or understanding with the Company or any other employer which requires union membership as a condition of employment, except as authorized by Section 8(a)(3) of the Act, and from restraining employees in any like or related manner in the exercise of their rights guaranteed in Section 7 (R. 122; Pet. App. 56a, 122). Affirmatively, the Board required the Brotherhood to post notices—setting forth the terms of the cease and desist order and its agreement to abide thereby—in all locations where notices to its members are customarily posted, and, subject to the Company's approval, in places where the Company customarily posts notices to the employees. Moreover, the Brotherhood was directed to publish the notice in the next succeeding issue of publications normally issued by it and distributed generally among its membership. (R. 123; Pet. App. 56a-57a.)

Rejecting the contention that it was unnecessary to provide for publication outside the State of Mon-

tana, the Board pointed out that "the Brotherhood has been involved in other proceedings before this Board involving the application of its closed shop contract in various parts of the United States [citing cases]. In addition, its very contract here in question applied to the Company's construction projects throughout the Country." (R. 115; Pet. App. 47a-48a).

C. The Decision of the Court of Appeals

The court below (per Madden, J.) held that the Board's findings were supported by substantial evidence and that the requirement for publication of the Board notice in a publication which the Brotherhood generally distributed to its membership was reasonable in light of the circumstances involved. Accordingly, the court enforced the Board's order in full (Pet. App. 5a-10a.)

ARGUMENT

1. Petitioner does not attack the findings of the Board, approved by the court below, that it violated the closed shop provisions of the Act. Nor does it deny (see Pet. 13) that the Board, under the broad remedial authority conferred by Section 10(c) of the Act, has power to require that a union respondent publish the Board's notice in a journal generally circulated among its members.[3] Petitioner's sole con-

[3] Publication requirements of the type here have frequently been enforced by the courts. See, *e.g.*, *International Typographical Union*, 86 NLRB 951, 963, and *International Typo-*

tention is that this is not an appropriate case for imposing such a requirement. A narrow issue of this kind, which turns on the particular facts, does not warrant review by this Court.

2. In any event, it was clearly within the Board's power to impose a publication requirement in this case. Refinery Engineering, the contracting employer, maintains its home office in Oklahoma and undertakes construction projects throughout the United States. Its labor agreement with petitioners was not limited geographically but was intended to cover Company employees wherever they were working. Under these circumstances, as the court below properly found (Pet. App. 9a):

> It would be futile to require only the posting of this notice in the national headquarters of [the] Union, or even to supplement the posting requirement with an order for publication limited to the State of Montana where the instant unfair practice occurred, for only a small portion of the workers potentially affected would be reached.

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graphical Union & Chicago Typographical Union No. 16, 87 NLRB 1418, 1426, enforced *sub nom. American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782 (C.A. 7), certiorari denied, 344 U.S. 812; *Teamsters Local 135*, 117 NLRB 635, 637, enforced, 267 F. 2d 870, 874 (C.A. 7), certiorari denied, 361 U.S. 914; *Local 420, United Association of Journeymen*, 111 NLRB 1126, 1128, enforced, 239 F. 2d 327 (C.A. 3); *International Association of Heat and Frost Insulators, Local 31*, 114 NLRB 1526, 1529, enforced, 261 F. 2d 347 (C.A. 1); *International Association of Heat & Frost Insulators, Local 47*, 118 NLRB 79, 84-85, enforced, 254 F. 2d 955 (C.A. D.C.).

Moreover, the Board properly took notice of the fact that petitioner had been found by the Board and the courts to have violated the closed shop provisions of the Act on several prior occasions,[4] and concluded from this history that, unless adequate notice was given of the Board's order, these unlawful activities might continue or be resumed.

3. There is no merit to petitioner's contention that publication of the notice is unnecessary, and serves only punitive purposes (Pet. 9-11). The contention rests on the assumption that, since the unfair labor practices were committed several years ago and petitioner has since discontinued its illegal conduct, there is no need for apprising the union members that closed shop conditions are no longer being enforced, or, if there is such a need, that it could adequately

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[4] *The Marley Co.*, 117 NLRB 107 (a nationwide company with headquarters in Kansas City); *Mechanical Handling Systems*, 122 NLRB 396, 406-407 (a Michigan corporation also engaged in business in Indiana), enforced *sub nom. National Labor Relations Board* v. *Local 60, United Brotherhood of Carpenters, etc.*, 273 F. 2d 699 (C.A. 7), reversed on other grounds, 365 U.S. 651; *Millwrights' Local 2232 (Farnsworth & Chambers Inc.)*, 122 NLRB 300, 309 (a large construction company doing business in Texas and 10 other states), enforced *sub nom. National Labor Relations Board* v. *Millwrights' Local 2232*, 277 F. 2d 217 (C.A. 5). Contrary to petitioner's contention (Pet. 11-12), these cases are not insignificant but were indicative of a general pattern of illegal closed shop practices at the time of the commission of the present violation. Nor can *Millwrights' Local 2232* be distinguished on the ground that the International Agreement was not directly involved; for it was found that the international union had mandated the enforcement of closed shop provisions by its constituent locals (see 277 F. 2d at 220-222).

be satisfied by the lesser requirement of posting the notices in petitioner's offices. It is well settled that the cessation of unfair labor practices does not bar a Board remedy. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563. Accordingly, no inference of a punitive purpose on the Board's part can be drawn from the circumstance that the Board has imposed a notification requirement though the illegal contract is no longer in effect. Nor can such inference be drawn from the circumstance that the Board required the notice to be published in a journal of general circulation instead of merely requiring it to be posted at petitioner's headquarters. With petitioner's headquarters located in Washington, D.C., and its members covered by contract with the Company working throughout the United States, a posting in Washington alone would, as the court below found (*supra*, p. 8), have been a "futile" requirement.

Similarly, there is no substance to petitioner's further contention that publication in petitioner's journal would be harmful and confusing (Pet. 12-13). The notice to be published is exactly the same as the notice required to be posted at petitioner's headquarters, and it is in the customary form of Board notices. Following the form of the Board's cease and desist order, it merely asserts that petitioner will not enter into or maintain any contract with the Company or any other employer which unlawfully conditions employment upon union membership, or in any like or related manner restrain or coerce the employees of the Company or any other employer in the exercise of their Section 7 rights (Pet. App. 58a-59a). It is

inconceivable that such a notice, which need be published only once, would cause the employees to question the validity of any current contract which contains no illegal union security provisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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National Labor Relations Board.

NOVEMBER 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *.

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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